Supreme Court, U.S.
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No. 96-182

IN THE

Supreme Court Of The United States

October Term, 1995

AMERICAN DEPOSIT CORP. and
BLACKFEET NATIONAL BANK,

Petitioners,

v.

JAMES W. SCHACHT, individually and as
Acting Director of Insurance of the State of Illinois,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF OF THE AMERICAN COUNCIL OF LIFE INSURANCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE AMERICAN COUNCIL OF LIFE INSURANCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

The American Council of Life Insurance hereby files this brief as *amicus curiae* in support of the Respondent in accordance with Rule 37.2 of the Supreme Court Rules. All parties have consented to the filing of this brief.

INTEREST OF THE *AMICUS CURIAE*

The American Council of Life Insurance ("ACLI") is a non-profit trade association of 606 stock and mutual life insurance companies. Collectively, ACLI member companies hold approximately 91 percent of the life insurance in force in the nation. ACLI member companies issue and sell fixed and variable annuities in all fifty states, and have always regarded

annuities as a true insurance product. Of ACLI's more than 600 member companies, 473 are licensed to sell insurance and annuity contracts in Illinois. In 1993, 270 member companies underwrote annuities for Illinois residents and received approximately $1.5 billion of premiums from Illinois residents for individual annuity contracts. These companies are subject to Illinois laws and regulations governing activities by insurance companies.

ACLI has a compelling interest in this case because its members in Illinois will suffer substantial competitive injury if appellants are permitted to underwrite and sell annuities in Illinois without complying with state regulatory requirements. All of ACLI's member companies will face similar harm in other states if appellants prevail here because a ruling adverse to ACLI's interests would erode the critical distinction between insurance and traditional banking activities under federal and state law. Finally, annuity contract holders will face harm if they purchase an annuity product from national banks that are not subject to state insurance regulation.

SUMMARY OF ARGUMENT, ARGUMENT, AND CONCLUSION

The Petition makes no reference to the decisions in *Blackfeet National Bank* v. *Nelson*, No. 94-40496-WS (N.D. Fla.), *appeal docketed*, No. 96-3021 (11th Cir. Jul. 18, 1996), denying summary judgment to the plaintiffs, and granting summary judgment to the defendant Insurance Commissioner. *Id.* (Aug. 28, 1995, denying summary judgment to plaintiffs); *id.* (June 13, 1996, granting summary judgment to defendant). The District Court in that case flatly rejected the identical arguments raised in the instant petition by the same parties. To remedy this omission, we attach in the Appendix the decisions in the Florida case for the assistance of the Court.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

BLACKFEET NATIONAL BANK and
AMERICAN DEPOSIT CORPORATION,

Plaintiffs,

v.

BILL NELSON as Treasurer and Insurance Commissioner of the State of Florida,

Defendant.

TCA 94-40496-WS

ORDER DENYING SUMMARY JUDGMENT

Before the court are plaintiffs' motion for summary judgment (document 23) and defendant's amended response thereto (document 83). Also before the court are the *amicus* briefs of the American Counsel of Life Insurance and the National Association of Life Underwriters. The parties and *amicus* have also supplemented their memorandum on numerous occasions (documents 57, 65, 71, 76, 79 and 82). On March 3, 1995, the court heard argument on the motion for summary judgment and at the conclusion thereof directed the parties to submit supplemental briefs (documents 90, 92 - 103).

I. Facts:

Plaintiff Blackfeet National Bank ("Blackfeet") is a national banking association organized and operated pursuant to the National Banking Act, Title 12, United States Code, Section 21 *et seq.* Blackfeet issues what is referred to as a "Retirement CD", a product developed by plaintiff American Deposit Corporation ("ADC") and issued by Blackfeet under a licensing agreement with ADC. On July, 13, 1994, Tom Gallagher[1], in his then capacity as Treasurer and Insurance Commissioner of the State of Florida, issued a show cause order and instituted an administrative proceeding against Blackfeet and ADC concerning Blackfeet's issuing and marketing the Retirement CD in the State of Florida. The crux of the allegations charge Blackfeet and ADC with engaging in the insurance business in the State of Florida in violation of Florida law.

Blackfeet and ADC have instituted the present action against defendant seeking a declaratory judgment that Blackfeet is authorized, by the powers conferred upon it by the National Banking Act, to receive and accept the Retirement CD, and that it is not subject to control or regulation by the State of Florida pursuant to its insurance laws. Blackfeet and ADC further seek an injunction restraining defendant from going forward with the administrative proceeding or otherwise interfering with the offering of the Retirement CD. Plaintiffs

---

[1] Initially, this suit named Gallagher in his individual and official capacity. During the March 3, 1995, hearing on the motion for summary judgment, plaintiffs' counsel, in response to the court's inquiry, notified the court that they were no longer seeking damages against Gallagher in his individual capacity and that they would file the appropriate pleading so as to substitute Bill Nelson, the current Treasurer and Insurance Commissioner, for Gallagher. Document 89 at 20. Although to date that pleading has not been filed with the court, based upon plaintiffs' counsel's representations, the court, pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure substitutes Bill Nelson for Gallagher.

have filed suit pursuant to Title 42, United States Code, Section 1983 and Title 12, United States Code, Section 24 and have moved for summary judgment on the above.

a. The Retirement CD:

The Retirement CD is a product which has been categorized by the plaintiffs as having traditional characteristics of a certificate of deposit and similarities with an annuity. The Retirement CD has two phases: an accumulation phase and a payout phase. Document 83, exhibit 3.

1. Accumulation Phase:

The Retirement CD is offered to individuals who open an account by making a deposit of at least $5,000. *Id.* at exhibit 7. During the accumulation phase of the Retirement CD, an individual pays money into an account which accumulates interest over a fixed period of time and builds value. Specifically, at the time of the initial deposit, the Retirement CD customer is offered a maturity date for the account. *Id.* During the period before the maturity date, interest on the deposit is credited to the account. Each customer is entitled to select a term from one to five years during which the interest rate will remain fixed, and after which the rate will fluctuate (never less than 3%) in accordance with Blackfeet's cost of funds. *Id.* A customer can make additional deposits into the account up and until the maturity date but may not withdraw funds without incurring a penalty. *Id.*

2. Payout Phase:

On the maturity date, the customer will select various options for repayment. The options available allow the customer to withdraw up to two-thirds of the balance in the customer's account (the principle plus the accrued interest) on the maturity date. *Id.* The balance of the account is distributed to the customer in fixed monthly amounts, including interest, for the customer's life. *Id.* Even if the depositor continues to live after receiving a return on the maturity bal-

ance, he or she, nonetheless, will continue to receive distributions. *Id.* The monthly distributions are determined with reference to permanent purchase rate guarantees at competitive interest rates (a minimum interest rate of 3%) and includes a refund feature. Under the refund feature, a customer, or his or her beneficiary, is guaranteed to receive an amount at least equal to the customer's account balance on the maturity date. *Id.*

II. Analysis:

a. Is Blackfeet Authorized To Sell The Retirement CD:

In addressing the motion for summary judgment, the first issue to be resolved is whether Blackfeet, as a national bank, is authorized to issue the Retirement CD.

The National Banking Act, Title 12, United States Code, Section 21 *et seq.*, authorizes national banks to carry on the business of banking. Among the core banking powers expressly conferred on national banks is the power to accept deposits. 12 U.S.C. § 24 (Seventh); *Department Of Banking And Consumer Finance v. Clarke,* 809 F.2d 266, 268 (5th Cir. 1987) *cert. denied* 403 U.S. 1010 (1987). National banks have the power "to make contracts," and

> [t]o exercise. . . all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; *by receiving deposits*; by buying and selling exchange, coin, and security; and by obtaining, issuing, and circulating notes. . . .

12 U.S.C. §§ 24 (Third & Seventh) (emphasis added). Among the issues before the court is whether the Retirement CD qualifies as a product able to be issued by a national bank under the authority of the banking act. Plaintiffs argue that the Retirement CD qualifies as a bank deposit and that accord-

ingly Blackfeet, as a national bank, is authorized under the National Banking Act to receive it.

In support of their contention that the Retirement CD is a bank deposit, plaintiffs proclaim that the Office of the Comptroller of the Currency ("OCC"), the federal agency that regulates national banks, has found that the acceptance of the Retirement CD by Blackfeet falls within the core powers of national banks to accept deposits and make contracts and that the OCC has no objection to its being offered by Blackfeet subject to implementation of certain requirements for the protection of depositors. *See* Document 17, exhibit 1 (May 12, 1994 letter from OCC).

> In the instant case, *the express authorization for the Bank to receive deposits and enter into contracts, coupled with its powers to incur liabilities and fund its operations, clearly make the Retirement CD an authorized Bank activity.* The inherent relationship that the Retirement CD customer has with the Bank is that of depositor or creditor. The customer places funds with the Bank and in turn receives the Bank's promise to repay the amount it has received, plus interest. This promise forms the very basis of the depositor or creditor/bank relationship.
>
> * * *
>
> *The Retirement CD is clearly a financial product whose primary attributes are grounded in the Bank's expressly authorized powers.* While somewhat novel in its approach to determining interest on deposits [sic] funds by providing customers, *inter alia*, with fixed periodic lifetime payment, the Retirement CD nonetheless represents fundamentally a bank authorized product. In recent years, national banks have responded to changing customer needs and market forces by offering a range of innovative *bank deposit related instruments*. . . .

Id. (emphasis added). Plaintiffs further maintain that the Federal Deposit Insurance Corporation ("FDIC") has also determined that the Retirement CD is a bank product which is federally insured up to the maturity date. *See* Document 17, exhibit 2 (May 12, 1994 letter from FDIC)

> With regard to the extent of the FDIC insurance, we have concluded that the a Retirement CD will be insured for the same amount (up to a maximum of $100,000) that would be payable to an account holder's beneficiary in the event of the account holder's death. That is, in the event the issuing bank were to fail prior to the maturity date, a Retirement CD would be insured to the same extent as any other type of CD, *i.e.*, for principal and accrued interest up to the date of failure. In the event that the bank were to fail after the maturity date, the FDIC would pay a customer the balance of the account at the maturity date (principal plus accrued interest) minus any lump sum distribution and any monthly payments, up to a maximum of $100,000. *Under no circumstances would FDIC insurance extend to the bank's commitment to make lifetime payments, as the value of such payments is uncertain and my exceed the total account balance.*

Id. (emphasis in original).

One question that has arisen in this case, is what weight to give to the OCC no objection letter. As the office charged with the supervision of the National Banking Act, the OCC bears the primary responsibility for surveillance of the business of banking. *Nationsbank of North Carolina v. Variable Annuity Live Ins. Co.*, -U.S.-; 115 S.Ct. 810 (1995). As a general rule, courts give great weight to any reasonable construction of a regulatory statute *adopted* by the agency charged with the enforcement of the statute. *Id. citing Clarke v. Securities Indus. Ass.*, 479 U.S. 388, 403 - 04 (1987)

(emphasis added); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

> Under the formulation now familiar, when we confront an expert administrator's statutory exposition, we inquire first whether the intent of Congress is clear as to the precise question at issue. If so that is the end of the matter. But if the statute is silent or ambiguous with respect to the specific issue, the question for the court is *whether the agency's answer is based on a permissible construction of the statute.* If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment controlling weight.

NationsBank, 115 S.Ct. at 813. (citations and internal quotations omitted). The above is particularly true where the question involves "expert judgment regarding the practical operation of the banking industry and the results that might be anticipated if particular business practices were instituted." *Investment Co. Inst. v. Clarke*, 793 F.2d 221, 222 (9th Cir. 1986) *cert. denied.* 479 U.S. 939 (1986).

In this case, the OCC's no objection letter authorizing Blackfeet to sell and market the Retirement CD because it is a bank deposit is persuasive authority if it is reasonable in light of the purpose of the National Banking Act. *First Nat'l Bank of Eastern Arkansas v. Taylor,* 907 F.2d 775, 777 (8th Cir. 1990)(determination of OCC as to what activities are authorized under the National Banking Act should be sustained if reasonable); *but see American Deposit Corp. v. Schacht*, 887 F.Supp. 1066, 1076 (N.D. Ill. 1995) (refusing to give weight to the OCC's no objection letter).

Defendant takes the position that the OCC's no objection letter is unreasonable. The gist of defendant's contention is that the OCC incorrectly focused on the Retirement CD's return of principal and interest in reaching its conclusion. De-

fendant maintains that the OCC instead should have viewed the retirement CD in light of its true selling component--the receipt by the customer of monthly payments after the maturity balance posted has been exhausted. Defendant maintains that these payouts, those made after the exhaustion of principal and interest, are indemnification by the bank using funds not belonging to the Retirement CD owner and that such payments constitute insurance and not a bank deposit. According to defendant, the OCC's treatment of the after exhaustion payments as interest loses sight of the fundamental principle that once the bank pays back the principal and interest due, any additional payments made are not interest but something else, *i.e.*, insurance.

Despite defendant's argument, the OCC's no objection letter finding that the Retirement CD qualifies as a bank deposit is reasonable in light of the purpose of the National Banking Act. The Supreme Court has recently upheld as reasonable the OCC's determination that national banks have the authority under the *National Banking Act* to operate as agents for insurance companies with respect to the sale of annuities because such activity qualifies as part of, or incidental to, the business of banking. *NationsBank of North Carolina*, 115 S.Ct at 814 - 15. The holding analogized conventional annuities to bank deposits and held that under the National Banking Act, the same qualified as investment products.

> By making an initial payment in exchange for future income stream, the customer is deferring consumption, setting aside money for retirement, future expenses, or a rainy day. For her, an annuity is like putting money in a bank account, a debt instrument, or a mutual fund. Offering bank accounts and acting as agent in the sale of *debt instruments* and mutual funds are familiar parts of the business of banking.

* * *

> In sum, modern annuities, though more sophisticated than standard savings bank deposits of old, *answer essentially the same need.* By providing customers with the opportunity to invest in one or more annuity options, banks are essentially offering financial investment instruments of the kind congressional authorization permits them to broker. Hence, the Comptroller reasonably typed the permission of NationsBank sought as an "incidental powe[r]. . . necessary to carry on the business of banking.

Id. at 815. The OCC in this case did not just focus on the principal and interest component of the Retirement CD as defendant suggests. The OCC also considered the payout structure encompassed in the payout phase of the CD and found that it did not change the conclusion that the Retirement CD qualified as a bank deposit.

> The fact that the product is structured to provide for interest payments keyed in part to the expected life of the depositor does not change the intrinsic nature of the Retirement CD as an authorized bank product. Modernizing bank practices to comport with ever changing customer needs is permissible, provided that the practices remain fundamentally what is authorized by the Act. In addition, utilizing creative funding techniques is a desirable, indeed necessary action for national banks.

Document 17, exhibit 1 (May 12, 1994, letter from OCC). The OCC clearly understood the implications surrounding the provision of the Retirement CD that allowed for potential payouts to a depositor beyond the exhaustion of the maturity balance. Indeed, the OCC recognized potential obstacles associated with a bank's receipt of the Retirement CD and sought to correct the problems by imposing a comprehensive

set of *banking* regulations that Blackfeet, and other national banks, must comply with. Among the conditions mandated by the OCC is that Blackfeet take appropriate steps to mitigate the risks entailed in assuming an obligation to make payments to the depositor over the depositor life.

> The Bank should take appropriate steps to deal with the risks it will undertake in connection with the Retirement CD. In particular, we note that the Bank assumes the risk of paying interest throughout the life of each depositor even in situations where the maturity balance becomes exhausted. The Bank's business plan should indicate in detail how it plans to mitigate this risk as well as the other risks, and consideration should be given to purchasing commercially available annuities from insurance companies to fund the Bank's payment obligations.

Id.[2]

Despite the concerns that the Retirement CD had characteristics in common with an annuity, the OCC, nevertheless, determined that the Retirement CD *retained enough qualities* to qualify as a bank deposit able to be issued and marketed by Blackfeet under the National Banking Act. *First Nat'l Bank of Eastern Arkansas,* 907 F.2d at 778 (courts that have considered similar issues look to see if the activity in question is closely related to an express power and is useful in carrying out the business of banking). Although not defined by the National Banking Act, a bank deposit, as the term is generally defined, means

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[2] The OCC plans to regulate the actuarial risks posed by the Retirement CD product, including the mortality risk. The OCC will review Blackfeet's compliance with the above conditions and "evaluate the manner in which it utilizes funds received from the Retirement CD and funds these obligations."

> [t]he act of placing money in the custody of a bank or banker, for safety or convenience, to be withdrawn at the will of the depositor or under rules and regulations agreed on.

Black's Law Dictionary, "Deposit" (6th Ed. 1990). The Retirement CD meets the definition of deposit. The Retirement CD "represents the very essence of banking which is embodied in a bank's express authority to accept deposits and enter into contracts, and authority to incur liabilities and fund its operation." Document 17, exhibit 1.

> In terms of its association with the business of banking, the Retirement CD "allows a bank to offer to its customers, in combination with its other banking related products, the traditional financial advantages normally associated with the business of banking. The product offers Bank customers the opportunity to obtain a return of their funds, structured to accommodate their retirement needs." *Id.*

In light of the OCC's comments on the issue, the court finds hat the Retirement CD, despite its risk shifting characteristics, qualifies as a bank deposit under the dictates of the National Banking Act.

b. Is The Retirement CD Subject To State Regulation:

Plaintiffs maintain that because the National Banking Act authorizes Blackfeet to sell and market the Retirement CD as a bank deposit, state insurance regulation of the Retirement CD is preempted. Defendant, on the other hand, maintains that even if Blackfeet has the power to issue the Retirement CD as a bank deposit, Florida may nevertheless still treat the Retirement CD as insurance and subject it to state insurance regulation.

The issue of whether the State of Florida can regulate Blackfeet's sale of the Retirement CD is complex. The issue involves two subsidiary questions: First is whether the State

of Florida's regulatory efforts are preempted under traditional preemption principles and the second is whether traditional preemption principles are altered by the McCarran-Ferguson Act. Plaintiffs maintain that because national banks are considered federal instrumentalities, states may neither prohibit nor unduly restrict their activities. In response, defendant argues that the McCarran-Ferguson Act limits the preemptive power of the National Banking Act in this case because it forbids courts from construing the National Banking Act in a manner that impairs Florida's authority to "regulate the business of insurance".

1. Conventional Preemption:

The National Banking Act constitutes the paramount authority for the operation of the national banking associations, and, by itself, constitutes a complete system for the establishment and government of national banks. *First Nat'l Bank in Plant City, Fla. v. Dickinson*, 396 U.S. 122 (1969). Nevertheless, national banks are subject to state laws, so long as those state laws do not conflict with the federal law, unduly burden the operations of the banking institution, or interfere with the objectives of the federal system. U.S. Const., Art. VI, cl. 2; *Fidelity Fed. Sav. & Loan Assoc. v. de la Cuesta*, 458 U.S. 141 (1982)(California law that prohibited the inclusion of a due-on-sale clause in loan instruments was preempted by a federal regulation that expressly granted to federal savings and loans the power to include such clauses in loan instruments); *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 378-79 (1954) (state law which prohibited national banks from advertising services they were authorized to render was preempted by Section 24 (Seventh) of the National Banking Act which provided bank with all "such incidental powers" necessary to carry on the business of banking).

In count I of defendant's administrative show cause order (document 17, exhibit 4), plaintiffs are charged with illegally soliciting the sale of an annuity product to consumers

without using agents licensed by the defendant in violation of Section 626.051, Florida Statutes, or using agents affiliated with a financial institution to transact insurance in violation of Section 626.988, Florida Statutes. Count II charges plaintiffs with acting as an insurance company in Florida without first obtaining a certificate of authority in violation of Section 624.401, Florida Statutes, or representing or aiding an unlicensed insurer in violation of Section 626.901, Florida Statutes. Count III charges plaintiffs with mischaracterizing an annuity as a certificate of deposit, by failing to disclose the "precise nature of the premium expense charges and/or administrative charges and/or year by year full surrender charges, by omitting information needed to prevent consumer deception, and by failing to identify an agent licensed in Florida on the application in violation of section 626.9541(1) (a) l.

As described by plaintiffs, the statutes and regulations that defendant seeks to apply to Blackfeet and ADC fall into four categories. The first, typified by section 626.988 would make it absolutely unlawful for Blackfeet to accept Retirement CD's from Florida residents.[3] Document 17, exhibit 4. The second category, embodied by section 624.401, would require Blackfeet to qualify as an insurance company before being able to sell the Retirement CD.[4] The third, would re-

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[3] Section 626.988(2) reads in pertinent part:
No insurance agent or solicitor licensed by the Department of Insurance under the provisions of this chapter who is associated with, under contract with, retained by owned or controlled by, to any degree, directly or indirectly, or employed by, a financial institution shall engage in insurance agency activities as an employee, officer, director, agent, or associate of a financial institution agency.

[4] This section provides in pertinent part:
No person shall act as an insurer, and no insurer or its agents, attorneys, subscribers, or representatives shall directly or indirectly transact insurance, in this state accept as authorized by a subsisting certificate of

quire any employee who acts on behalf of Blackfeet in receiving and accepting the Retirement CD to be licensed under Florida's insurance laws, while the fourth category, represented by section 626.9541(1)(a)1, dictates what disclosures Blackfeet would have to make in marketing the Retirement CD to Florida residents.[5]

Among the authority vested upon national banks by Congress is the power to receive deposits and exercise all such incidental powers necessary to carry on the business of banking. 12 U.S.C. § 24 (Seventh). As discussed above, the Retirement CD, despite its risk shifting characteristics, qualifies as a bank deposit expressly authorized under the National Banking Act. In this sense, the statutes cited by defendant in the show cause order conflict with the powers vested to Blackfeet under Section 24 (Third) and (Seventh) of the National Banking Act. Each of the state statutes serves in some manner to prohibit plaintiffs from performing the activities *expressly* provided by Section 24 (Seventh); i.e., receiving bank deposits. (emphasis added); *see First Nat'l Bank Of Eastern Arkansas*, 907 F.2d at 777 (finding that National Banking Act, pursuant to conventional preemption principles, preempted Arkansas' authority to prohibit bank from offering debt cancellation contracts because the same was an incidental power to the business of banking). Section 626.988 serves to completely prevent Blackfeet from selling the Retirement

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authority issued to the insurer by the department, except as to such transactions as are expressly otherwise provided for in this code.

[5] This section defines unfair methods of competition and unfair or deceptive acts or practices in the advertising of insurance policies as:

> Knowingly making, issuing, circulating, or causing to be made, issued, or circulated, any estimate, illustration, circular, statement, sales presentation, omission, or comparison which. . . [m]isrepresents the benefits, advantages, conditions, or terms of any insurance policy.

CD in Florida.[6] Sections 624.401 and 626.901 require Blackfeet and its employees to obtain a state "insurance license" in order to receive a bank deposit, while section 626.9541(1)(a)1 specifies what disclosures Blackfeet must make in marketing the bank deposit. Because the regulatory statutes defendant seeks to apply create obstacles and unduly interfere with the express authority granted Blackfeet under the National Banking Act to receive deposits, under conventional preemption analysis the state statutes do not apply to Blackfeet's activities surrounding the Retirement CD.

2. McCarran-Ferguson Reverse Preemption:

Defendant argues that the McCarran-Ferguson Act, Title 15, United States Code, Section 1011 - 1015, exempts the regulatory statutes he alleges plaintiffs have violated from conventional federal preemption. In pertinent part, the McCarran-Ferguson Act reads:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . .

15 U.S.C. § 1012(a) and (b). The primary purpose of the McCarran-Ferguson Act is to preserve to the states regulation of the business of insurance. *United States Dep't of Treasury*

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[6] As defendant interprets the Florida Insurance Code, the Retirement CD cannot be issued by Blackfeet to a Florida resident except through an agent licensed by the Department of Insurance. However, pursuant to section 626.988, it is unlawful for a licensed agent to work for a national bank

v. Fabe, -U.S.-; 113 S.Ct. 2202, 2207 (1993)("[s]tate laws enacted for the purpose of regulating the business of insurance do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise"); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979). Although ordinarily a federal law supersedes any conflicting state law, *supra*, the McCarran-Ferguson Act "creates a *reverse-preemption* doctrine for insurance litigation." *Barnett Bank of Marion County v. Gallagher*, 43 F.3d 631, 634 (11th Cir. 1995)(emphasis added); *Fabe*, 113 S. Ct. at 2211.

Plaintiffs, nonetheless, argue that the McCarran-Ferguson Act does not apply to preempt "core banking" powers. They assert that "notwithstanding the sweeping language of the McCarran-Ferguson Act, there are statutes that do not 'specifically relate to the business of insurance' but nevertheless deal with matters of such 'paramount importance' to the national interest that Congress could not conceivably have intended to turn them over to the states." (internal citations omitted). Plaintiffs argue that "Congress did not intend 'the business of insurance' to encompass lawful activities of national banks." *First Nat'l Bank of Eastern Arkansas*, 907 F.2d at 780.

Despite plaintiffs' arguments to the contrary, the activities of national banks are not spared from McCarran-Ferguson reverse-preemption. Although the McCarran-Ferguson Act primarily protects the insurance industry from the operation of antitrust laws, it also preempts other federal statutes that encroach upon a state's regulation of the business of insurance. Thus, under the McCarran-Ferguson Act, if a state law regulates the business of insurance, then *no federal law* may impair it, unless the federal law also regulates the business of insurance or specifically states that it is preempting the particular state law. *Fabe*, 113 S.Ct at 2208; *Barnett Bank*, 43 F. 3d at 634.

For McCarran-Ferguson reverse-preemption to apply several factors must be established. First, the court must in-

quire whether the Florida statutes in question were established for the purpose of regulating the business of insurance so as to presumptively preempt any contrary federal law. *Id.* Second, the court must determine whether the federal statutes in question, in this case the Title 12, United States Code, Section 24 (Third and Seventh), specifically relate to insurance so as to fit within the McCarran-Ferguson exception that reinstates federal law as supreme.[7] *Id.* Finally, the court must determine whether the activity which brought about the cause of action is the business of insurance within the meaning of the McCarran-Ferguson Act. *Royal Drug Co.*, 440 U.S. at 210; *S.E.C. v. National Sec., Inc.*, 393 U.S. 453, 459 - 60 (1969); *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388, 392 (6th Cir. 1994)("[w]hether a particular activity is part of the 'business of insurance' is, of course, a separate question from whether a state law was 'enacted. . . for the purpose of regulating the business of insurance").

In determining whether a particular state law was enacted for the purpose of regulating the business of insurance, the Supreme Court has held that the key question is whether the law was enacted to regulate policyholders and their relationship to an insurance company.

> The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement [are] the core of the [regulation] of the business of insurance. Undoubt-

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[7] Plaintiffs have not argued that Title 12, United States Code, Section 24 (Third and Seventh) specifically relate to insurance. Accordingly, the court does not address this issue. Notwithstanding, it appears obvious that Section 24 (Third and Seventh) specifically relate to the business of banking and not insurance. *See Barnett Bank*, 43 F.3d at 636 - 37 (finding that federal statute allowing national banks to act as insurance agents in town with fewer than 5,000 people did not specifically relate to the business of insurance under McCarran-Ferguson and did not specifically require preemption of Florida's statutory prohibition against bank subsidiaries conducting insurance activities).

> edly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term was . . . it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the business of insurance.

S.E.C. v. National Sec., Inc., 393 U.S. at 460. Those laws that possess the end, intention, or aim of adjusting, managing, or controlling the business of insurance, regulate the business of insurance under the McCarran-Ferguson Act. *Fabe*, 113 S.Ct. at 2210.

The statutes cited by defendant, to the extent that they seek to regulate a financial institution's involvement in *insurance* activity, regulate the business of insurance under the McCarran-Ferguson Act. (emphasis added).[8] Particularly, each of the statutes cited by defendant expresses a concern with overreaching by financial institutions if permitted engage in insurance activity, *i.e.*, selling or marketing *insurance*. *Barnett Bank*, 43 F.3d at 635. Section 626.988 was enacted in response to concerns of coercion and unfair trade practices if banks were permitted to engage in insurance activity. *Id.* Likewise, the unfair trade practice violations cited in the show cause order propose to prevent the deception of insurance consumers in the insurance solicitation process. In this sense, each of the statutes, *to the extent that they curtail Blackfeet's involvement in the business of insurance*, focuses on protecting the relationship between an insurance company and its policyholders and thus regulate the business of insurance as defined by the McCarran-Ferguson Act.

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[8] In *Barnett Bank*, *supra*, the Eleventh Circuit held that Section 626.988(2), Florida Statutes, regulates the business of insurance within the meaning of the McCarran-Ferguson Act.

3. Is The Retirement CD Insurance:

Plaintiffs argue that the Retirement CD is not the business of insurance. For purposes of this motion, the parties have agreed that the Retirement CD should be considered an annuity. Notwithstanding the label attached by the parties, the dispositive issue at this stage is whether the Retirement CD, given its characteristics, qualifies as insurance under the McCarran-Ferguson Act.[9] If the underwriting, sale and marketing of the Retirement CD qualifies as insurance, then Blackfeet and ADC's activities in issuing the Retirement CD is subject to insurance regulation by the State of Florida. If, on the other hand, the same does not qualify as insurance, then the State of Florida can not use its insurance laws to regulate Blackfeet and ADC's activities with respect to the Retirement CD.

1. The Business Of Insurance:

As dispositive of the issue that the Retirement CD is not insurance for purposes of the McCarran-Ferguson Act, plaintiffs cite to the recent Supreme Court decision in *NationsBank supra*. In *NationsBank* the Supreme Court affirmed as reasonable the OCC's determination that for purposes of Title 12, United States Code, Section 92, *supra* fn 9, annuities were properly classified as investments and not insurance. 115 S.Ct. at 814- 15. Although persuasive, *NationsBank* is not dispositive of the issue at hand. In *NationsBank* the Supreme Court only affirmed as reasonable the OCC's finding that an-

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[9] Plaintiffs argue that it "would be grossly anomalous to hold that. . . [the Retirement CD is] not insurance in the banking context. . ." but is for purposes of the McCarran-Ferguson Act. Plaintiffs have misconstrued the issue. The court did not consider whether the Retirement CD was insurance under the banking act. What the court considered was whether the Retirement CD qualified as a bank deposit under the National Banking Act. Whether the Retirement CD also qualifies as insurance under the McCarran-Ferguson Act is a separate issue requiring a separate analysis.

nuities were investments and not insurance under §92. The issue of whether annuities qualified as insurance under the McCarran-Ferguson Act was never addressed by the Court in *NationsBank*. In fact, the Court, in affirming the Comptroller, resisted the temptation to *per se* classify annuities as investments and not insurance.

> As our decisions underscore, a characterization fitting in certain contexts may be unsuitable in others.

Id. at 816 *citing Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) ("meaning [of words] well may vary to meet the purposes of the law"; courts properly give words "the meaning which the legislature intended [they] should have in each instance").

In support of the argument that the Retirement CD is insurance, defendant cites to the OCC's response letter to John D. Dingell, Chairman of the United States House of Representatives Committee on Energy and Commerce. Congressman Dingell had previously, by letter (document 83, exhibit 1), expressed to the Chairman of both the OCC and the FDIC the concerns of the Committee on Energy and Commerce ("Committee") surrounding the OCC's no objection letter to Blackfeet that the Retirement CD was a bank deposit authorized to be sold directly by national banks under the National Banking Act and that the principle and interest component of the Retirement CD was federally insured. Among the concerns of the Committee was that the OCC did not address whether the underwriting of the Retirement CD by national banks needed to comply with state insurance laws and regulations. In response to this concern, the Chairman of the OCC wrote to the Committee

> While the Retirement CD possesses some of the characteristics of an annuity, as a legal matter our no-objection position is not an authorization for banks to underwrite annuities. In concluding that the Retirement CD represents a bank authorized

> product, we did not need to address the question of whether the bank is authorized to sell or underwrite annuities, or whether annuities are insurance products.
>
> Our analysis and conclusion were limited to a determination of the bank's authority to conduct the business of banking under the National Bank Act. State regulatory officials may conclude that the state insurance laws also apply to the Retirement CD or any other activity which we interpret as being authorized by the National Bank Act. Such a conclusion however, does not affect or interpretation of the Act. *A state's insurance laws and the National Bank Act are different laws with different purposes behind them.*

Document 83, exhibit 2 (emphasis added). The above letter from the OCC demonstrates both that the OCC did not consider the issue of whether the Retirement CD qualified as insurance under the McCarran-Ferguson Act and that from the OCC's standpoint, the possibility existed that the Retirement CD might be subject to state insurance regulation.

During the hearing on the motion for summary judgment, defendant repeated the position that the sale of annuities were the business of insurance because Florida regulates them as insurance. Document 89. Despite Florida's treatment of annuities under the Insurance Code, Section 624.602(1), Florida Statutes, the determination of what constitutes insurance within the meaning of the McCarran-Ferguson Act is a matter of federal law. *S.E.C. v. Variable Annuity Life Ins. Co. ("VALIC")*, 359 U.S. 65, 69 (1959). Inasmuch as the issue is one of federal law, Florida's classification does not control in deciding whether Blackfeet and ADC's activities concerning the Retirement CD is the business of insurance. *Id.* at 69. Although many aspects of insurance companies are regulated by state law, not all are insurance. *Royal Drug Co.*, 440 U.S. at 230 n. 38 (the sale of a product by an insurance

company does not inevitably render the product insurance). The McCarran-Ferguson Act leaves the "business of insurance" and not the "business of insurers" to state regulation. *Id.* at 217.

The Supreme Court has identified certain criteria relevant to determining whether a particular activity--in this case the Retirement CD--is part of the business of insurance. Most important is whether the activity in question has the effect of underwriting or spreading a policyholder's risk. *Royal Drug Co.*, 440 U.S. at 211 ("[i]nsurance is an arrangement for transferring and distributing risk"); *VALIC*, 359 U.S. at 70 - 72. In addressing the issue of whether the Retirement CD is insurance, the Supreme Court has identified the combination of "mortality risk"[10] and the "guarantee payment of a fixed return" to a policyholder as fundamental characteristics of insurance. *VALIC*, 359 U.S. at 71.[11] When the characteristics

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[10] Mortality risk encompasses the transfer of economic risk of death from the consumer of a product to the issuing company. The legal form of a life annuity involves an agreement by one party (the annuitant) to pay money to another party (the institution) in exchange for a promise to be repaid the contributed amounts plus interest in periodic payments that continue throughout the life of the annuitant. The annuity contract protects the annuitant from the possibility of out living his or her resources. The amount of the periodic payments are determined by the life expectancy of the annuitant pursuant to actuarial calculations. The annuitant risks that death will come before he or she receives annuity payments in the amount he or she expended to purchase the annuity. In guaranteeing periodic payments for the lifetime of the annuitant, the issuing entity gambles that the annuitant will die prior to the actuarial predictions and not live so long that the total of the periodic payments will exceed the value of the price received for the annuity.

[11] In *VALIC*, the Supreme Court considered whether a variable annuity was insurance. The insurance companies stressed that because the company assumed the mortality risks associated with the variable annuity, the same was insurance. The Supreme Court, however, found mortality risk alone an insufficient basis for concluding that a variable annuity was insurance. According to the Court, insurance "involves some investment risk-taking on the part of the company" and "a guaran-

of the Retirement CD are examined it becomes clear that the Retirement CD qualifies as insurance under the McCarran-Ferguson Act. Specifically, the Retirement CD employs the requisite combination of mortality risk and guarantee payment of a fixed return identified by the United States Supreme Court. The mortality risk factor common in both variable and fixed annuities is a characteristic of the Retirement CD. Specifically, the Retirement CD's post-maturity monthly payments to the customer are calculated, in substantial part, on the actuarial prediction of how long the customer will live and are guaranteed to the annuitant for his or her lifetime regardless of whether the maturity balance is exhausted; the customer thus hopes to live long enough that the monthly lifetime payments exceed the value of the maturity balance while the bank gambles that the customer will not live long enough to exhaust the maturity balance. Document 83, exhibit 6. There is also a guarantee payment of a fixed return in the sense that the annuitant is guaranteed to receive a specified and definite amount in monthly payments during his or her lifetime. Document 83, exhibit 7. Contributions from the Retirement CD are mingled with Blackfeet's general assets and invested primarily as other debt instruments. Docu-

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tee that at least some fraction of the benefits will be payable in fixed amounts." In discussing this aspect of insurance, the Court distinguished the variable annuity from traditional fixed annuity. The court found that generally, the funds underlying the fixed annuity are invested according to conservative standards, and the fixed annuity pays a specified and definite amount to the annuitant in periodic payments. In contrast, the variable annuity's funds are invested primarily in common stocks and other equities, and the variable annuity's periodic payments vary with the success of the company's investment experience. The holder of a variable annuity is not able to depend upon the annuity paying a fixed return. Although there was a mortality risk factor encompassed in the variable annuity in *VALIC*, because the annuity contract offered did not guarantee a fixed return, the court found that the annuity placed all the risk on the annuitant and none on the company and thus there was no true underwriting of risk so as to classify the annuity as insurance.

ment 89 at 45. Regardless of Blackfeet's investment success, the post-maturity lifetime monthly payments received by the Retirement CD customer remain fixed with a guaranteed rate of interest of at least 3%. Document 83, exhibit 7. Blackfeet thus undertakes the underwriting risk identified in *VALIC* concerning its ability to make a sufficient return on its investments so as to pay the periodic installments it has promised the Retirement CD customer. *Otto v. Variable Annuity Life Ins.*, 814 F. 2d 1127, 1133 (7th Cir. 1986).

Because the Retirement CD employs the requisite combination of mortality risk and guarantee payment of a fixed return identified by the Supreme Court in *VALIC*, it is an appropriate subject for regulation by the State of Florida as an insurance product.

III. Conclusion:

The Retirement CD is a hybrid product with characteristics that qualify it as both an authorized bank product under the National Baking Act and insurance under the McCarran-Ferguson Act. Because the Retirement CD qualifies as insurance under the McCarran-Ferguson Act, defendant's regulation of the Retirement CD is permitted.

Accordingly it is ORDERED:

1. Plaintiffs' motion for summary judgment is DENIED.

2. The parties are directed to notify the court within 10 days of receipt of this order of any issues that remain for the court's consideration.

DONE AND ORDERED this 28th day of August, 1995.

/s/ WILLIAM STAFFORD
WILLIAM STAFFORD
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NOTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

BLACKFEET NATIONAL BANK and
AMERICAN DEPOSIT CORPORATION,

Plaintiff,

v.

BILL NELSON, as Treasurer
and Insurance Commissioner,
of the State of Florida,

Defendant.

TCA 94-40496-WS

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Blackfeet National Bank ("Blackfeet") is a national banking association organized and operated pursuant to the National Banking Act, Title 12, United States Code, Section 21 *et seq*. Blackfeet issues what is referred to as a "Retirement CD", a product developed by plaintiff American Deposit Corporation ("ADC") and issued by Blackfeet under a licensing agreement with ADC. On July, 13, 1994, Tom Gallagher, in his then capacity as Treasurer and Insurance Commissioner of the State of Florida,[1] issued a show cause order and instituted administrative proceedings against Blackfeet and ADC concerning Blackfeet's issuing and marketing the Retirement CD in the State of Florida. The crux of the allegations charge Blackfeet and ADC with engaging in the

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[1] Bill Nelson has since been substituted for Gallagher. Document 104 at n. 1.

insurance business in the State of Florida in violation of Florida law.

Blackfeet and ADC have instituted the present action against defendant seeking a declaratory judgment that Blackfeet is authorized, by the powers conferred upon it by the National Banking Act, to receive and accept the Retirement CD, and that it is not subject to control or regulation by the State of Florida pursuant to its insurance laws. Blackfeet and ADC further seek an injunction restraining defendant from going forward with the administrative proceeding or otherwise interfering with the offering of the Retirement CD. Plaintiffs have filed suit pursuant to Title 42, United States Code, Section 1983 and Title 12, United States Code, Section 24.

On August 28, 1995, this court denied plaintiffs' motion for summary judgment. The court found that there were no material issues of fact in dispute and concluded that although the Retirement CD qualified as an authorized bank product under Title 12, United States Code, Section 24, it also, as a matter of law, qualified as insurance under the McCarran-Ferguson Act, which reverses the rule of federal preemption, and thus the State of Florida could regulate the same pursuant to its insurance laws. *See* Document 104. Pending before the court at this time are plaintiffs' motion for reconsideration (document 105) and renewed motion for summary judgment (document 108) and defendant's motion for summary judgment (document 106). On April 1, 1996, the court, in view of the United States Supreme Court's decision in *Barnett Bank of Marion County, N.A. v. Nelson*, -U.S.-; 116 S.Ct. 1103 (1996), directed the parties, and *amicus curiae*, to submit supplemental memoranda of law on the issues pending before the court.

Plaintiffs move the court to reconsider its decision concluding that the State of Florida can regulate the Retirement CD. Plaintiffs first argue that the Florida First District Court of Appeal in *State, Department of Insurance v. Great Northern Insured Annuity Corporation*, 667 So. 2d 796 (1995),

held that annuities are not insurance under the Florida Insurance Code and thus the Retirement CD, as an annuity, is not subject to regulation under Florida's Insurance Code. Second, plaintiffs argue that if the Retirement CD qualifies both as an insurance product and an authorized bank product, then the provisions of the Banking Act which authorize the Retirement CD must specifically relate to the business of insurance so as to fit within the McCarran-Ferguson exception that reinstates federal law as supreme.

As noted most recently by the United States Seventh Circuit Court of Appeals in *American Deposit Corporation v. Schacht*, -F.3d-; 1996 WL 252869, "[t]he tension in this case comes from the apparent overlap between activities . . . authorized by the Bank Act and activities that individual states have an interest in regulating." In this light, the analytical frame work in which the issues presented are reviewed must be discussed once again.

Ordinarily, a federal law preempts a conflicting state law under the Supremacy Clause of Article VI of the Constitution. The National Banking Act, Title 12, United States Code, Section 21 *et seq.*, which constitutes the paramount authority for the operation of the national banking associations, and, by itself, serves as the complete system for the establishment and government of national banks, "is of no exception." *See Barnett Bank*, 116 S.Ct. at 1107 - 08; *accord* Document 104 at 13. Notwithstanding, with respect to the "business of insurance", the McCarran-Ferguson Act[2] reverses the normal rules

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[2] The McCarran-Ferguson Act reads in pertinent part:

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which

of preemption by imposing a rule that state laws enacted for the purpose of regulating the business of insurance[3] do not yield to conflicting federal statutes unless the federal statute itself specifically relates to the business of insurance. *Barnett Bank*, 116 S.Ct. at 1111.

Plaintiffs argue that the McCarran-Ferguson Act does not apply to this case because the Retirement CD is not the "business of insurance." Plaintiffs made this argument to the court in their initial motion for summary judgment and the same was rejected. Document 104 at 21-26. Plaintiffs now argue, however, that the decision of the Florida First District Court of Appeal in *Great Northern*, *supra*, "fundamentally transforms the premises upon which [this court's] Order is based" in that the court in *Great Northern* held that "annuities are not insurance under the Florida Insurance Code." Document 105 at 3. Even assuming that *Great Northern* stands for the proposition that annuities are not insurance, the same is not dispositive of the issue at hand. The meaning of insurance under the McCarran-Ferguson Act is not question of state law, but rather is one of federal law. *S.E.C. v. Variable Annuity Life Ins. Co. ("VALIC")*, 359 U.S. 65, 69 (1959); Document 104 at 24. What must be examined is whether the practice in question--in this case underwriting of the Retirement CD--is properly considered insurance.[4]

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imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . .

[3] The Supreme Court in *Barnet Bank* did not overrule the portion of the Eleventh Circuit's opinion that found that Section 626.988 (2) regulated the business of insurance within the meaning of the McCarran-Ferguson Act. Accordingly, the court considers this aspect of the Eleventh Circuit opinion authoritative and will not revisit the issue.

[4] The *Great Northern* case does not change the fundamental premise upon which the court's order denying plaintiffs' summary judgment is based. The decision in *Great Northern* did not address whether national banks could underwrite annuity products free from state regulation. Rather, the court in *Great Northern* was concerned with the ability of

As this court attempted to articulate in its August 28, 1995, order denying plaintiffs' summary judgment, the Supreme Court has spoken on the issue of what constitutes "insurance" under the McCarran-Ferguson Act by identifying certain criteria relevant to the inquiry. Most important is whether the activity in question has the effect of underwriting or spreading a policyholder's risk. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211 (1979). Among the fundamental characteristics of insurance is the combination of mortality risk[5] and a guarantee payment of a fixed re-

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Florida Chartered banks to sell annuities in the same manner as national banks pursuant to the parity provision of Florida's Insurance Code, Section 626.988 (8), Florida statutes. The *Great Northern* court, following the decision of the Supreme Court in *Nationsbank of North Carolina, N.A. v. Variable Annuity Life Insurance Company*, -U.S.-; 115 S.Ct. 810 (1995) held only that "[i]n the event that a national bank is authorized . . . to sell one or more types of annuities in Florida pursuant to federal law, Florida Chartered banks . . . shall be authorized to sell the same type of annuities notwithstanding the provisions of this section . . . ."

[5] Mortality risk encompasses the transfer of economic risk of death from the consumer of a product to the issuing company. "Essentially, lifetime annuities such as the Retirement CD are "mirror images of life insurance policies. With Life insurance, the issuing company gambles that the purchaser of the policy will not pass away sooner than predicted such that the company does not receive enough in premiums and interest to cover the policy's payout obligation." *Schacht*, 1996 WL 252869 at 4. The legal form of a life annuity, like the Retirement CD, involves an agreement by one party (the annuitant) to pay money to another party (the institution) in exchange for a promise to be repaid the contributed amounts plus interest in periodic payments that continue throughout the life of the annuitant. The annuity contract protects the annuitant from the possibility of out living his or her resources. The amount of the periodic payments are determined by the life expectancy of the annuitant pursuant to actuarial calculations. The annuitant risks that death will come before he or she receives annuity payments in the amount he or she expended to purchase the annuity. In guaranteeing periodic payments for the lifetime of the annuitant, the issuing entity gambles that the annuitant will die prior to the actuarial predictions and not live so long that the

turn. *VALIC*, 359 U.S. at 71.[6] As previously noted by this court, the Retirement CD has the component fundamental risk shifting characteristics of insurance identified by the Supreme Court in that it offers both a guaranteed payment to the annuitant for the rest of his or her life in a predetermined amount and a guarantee return of the total balance. Document 104 at 26.

The court is not alone in the above holding. Most recently the United States Seventh Circuit Court of Appeals, faced with the identical issues before this court, held in *Schacht, supra*, that the Retirement CD was "the business of insurance" for purposes of the McCarran-Ferguson Act." *Schacht*, 1996 WL 252869 at 6. In so concluding, the Seventh Circuit, like this court, focused on the risk shifting characteristics of the Retirement CD.

> The Retirement CD . . . offers a guaranteed payment to the annuitant for the rest of his life in a predetermined amount and also provides a guaranteed return on the total balance. Thus it involves both fundamental characteristics of insurance: a mortality risk and a guaranteed return.

Id. at 5.[7]

Plaintiffs also argue that the McCarran-Ferguson Act's reverse preemption rule does not apply to this case because Title 12, United States Code, Section 24 (Third) and

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total of the periodic payments will exceed the value of the price received for the annuity.

[6] Although the court in *VALIC* did not hold "as a universal matter that a combination of mortality risk and the guarantee payment of a fixed return . . . invariably makes an arrangement one of insurance" (document 105 at 5 n. 5), the presence of these characteristics are key indicators that a product is insurance.

[7] The Seventh Circuit also noted in *Schacht* that the legislative history of the McCarran-Ferguson Act also supported the conclusion that the Retirement CD is the business of insurance.

(Seventh) specifically relate to the business of insurance. Plaintiffs aver that because this court found the Retirement CD to qualify as both an insurance product and an authorized bank product, the National Banking Act provisions that authorizes the Retirement CD--Title 12, United States Code, Section 24 (Third) and (Seventh), specifically relate to the business of insurance. Thus, according to plaintiffs, "the McCarran-Ferguson reverse preemption is inapplicable." Document 105 at 6.

Given the Supreme Court's recent decision in *Barnett Bank, supra,* the court concludes that Title 12, United States Code, Section 24 (Third) and (Seventh) do not specifically relate to the business of insurance. *Barnett Bank* involved a direct conflict between Section 626.988, Florida Statutes, which prohibits banks from selling insurance and Title 12, United States Code, Section 92, which permits banks to act as insurance agents in towns with populations of less than 5000 people. Among the issues before the court was whether the McCarran-Ferguson Act allowed Section 626.988 to stand despite Section 92.

The Supreme court concluded that McCarran-Ferguson reverse preemption did not apply to the case because Section 92 specifically related to the business of insurance. The Court relied on the fact that Section 92 "explicitly" granted national banks permission to sell insurance and that the statute contained specific rules prohibiting banks from guaranteeing premium payments or the truth of statements made by the assured.

> [U]sing ordinary English, one would say that this statute specifically relates to the *business of insurance*. The statute explicitly grants national banks permission to act as the agent for any fire, life, or other insurance company, to solicit and sell insurance, to collect premiums, and to receive for services so rendered. . . fees or commissions, subject to the Comptroller regulation. It also sets forth certain

> specific rules prohibiting banks from guaranteeing the payment of any premium on insurance policies issued through its agency. . . and the truth of any statement made by an assured in filing his application for insurance. The statute thereby not only focuses directly upon industry-specific selling practices, but also affects the relation of insured to insurer and the spreading of risk—matters that this Court, in other contexts, has placed at the core of the McCarran-Ferguson Act's concern.

Id. at 1111 - 12. The court found that the purpose of the McCarran-Ferguson Act was not to insulate state insurance regulation from the reach of all federal law, but "to protect state regulation primarily against inadvertent federal intrusion--say, through enactment of a federal statute that describes an affected activity in broad, general terms, of which insurance business happens to comprise one part." *Id.* at 1112.

Unlike Section 92 of Title 12, the provisions of Title 12, United States Code, Sections 24 (Third) and (Seventh)--the power to accept deposits and to enter into contracts--contain no reference to insurance. As noted by the Seventh Circuit in *Schacht,* "[n]either provision "explicitly grants banks permission to conduct insurance-related activity; neither focuses directly on specific insurance selling practices; and neither affects the relation of the insured to insurer and the spreading of risk." *Schacht,* 1996 WL 252869 at 7. To the contrary, in the context of the Retirement CD, Section 24 (Third) and (Seventh) "are exactly the intrusion the Court warned against: both sections describe an affected activity (banking) in broad terms, of which the insurance business (the Retirement CD) is only a part." *Id.*

The mere fact that this court has held that the Retirement CD qualifies as an authorized bank product does not mean that state insurance regulation is supplanted. As the Supreme Court held in *Nationsbank,* "a characterization fitting in certain contexts my be unsuitable in others." 115 S.Ct. at 816.

Even the Office of the Comptroller of the Currency ("OCC"), the federal agency that regulates national banks, acknowledges that defendant has regulatory authority over the Retirement CD.

> While the Retirement CD possesses some of the characteristics of an annuity, as a legal matter our no-objection position [to the issuance of the Retirement CD by national banks] is not an authorization for banks to underwrite annuities. In concluding that the Retirement CD represents a bank authorized product, we did not need to address the question of whether the bank is authorized to sell or underwrite annuities, or whether annuities are insurance products.
>
> Our analysis and conclusion were limited to a determination of the bank's authority to conduct the business of banking under the National Bank Act. State regulatory officials may conclude that the state insurance laws also apply to the Retirement CD or any other activity which we interpret as being an authorized by the National Bank Act. Such a conclusion, however, does not affect our interpretation of the Act. A state's insurance laws and the National Bank Act are different laws with different purposes behind them.

Document 83, exhibit 2. The OCC would certainly have taken a different tack with respect to the Retirement CD if it believed that state insurance laws necessarily had to yield to the power of national banks because the National Banking Act relates to the business of insurance. The court's construction of the Retirement CD as a hybrid product that qualifies as both a bank product under the National Banking Act and insurance under the McCarran-Ferguson Act is not inconsistent or "grossly anomalous." The explication simply reconciles "two bodies of federal law in a manner that respects

the Congressional limitations of each" in lieu of the facts before the court. *Schacht,* 1996 WL 252869 at 8.

As this court has previously stated, "[t]he Retirement CD is a hybrid product with characteristics that qualify it as both an authorized bank product under the National Ba[n]king Act and insurance under the McCarran-Ferguson Act." Because the relevant sections of Florida's Insurance Code were enacted for the purpose of regulating the business of insurance, and because the National Banking Act does not relate to the business of insurance, the McCarran-Ferguson Act permits defendant to regulate the Retirement CD in the State of Florida.

Accordingly it is ORDERED:

1. The court's October 28, 1995, order (document 104) is incorporated by reference into and made part of this order of the court.

2. Plaintiffs' motion for reconsideration (document 105) and renewed motion for summary judgment (document 108) are DENIED.

3. Defendant's motion for summary judgment (document 106) is GRANTED. The clerk is directed to enter judgment in favor of defendant and against plaintiffs.

4. All motions which remain pending are DENIED as moot.

DONE AND ORDERED this 13th day of June, 1996.

/s/ WILLIAM STAFFORD
WILLIAM STAFFORD
UNITED STATES SENIOR DISTRICT JUDGE